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No. 82-1195

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

DALE F. MEYER,
on behalf of himself and
all others similarly situated,
Petitioner,

vs.

THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER, INC.,
UCA SYSTEMS, INC., JAMES L. MILLER,
and GERALD P. KOOYERS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents Thomson McKinnon Securities Inc. (hereinafter "Thomson McKinnon") and James L. Miller (hereinafter "Miller") hereby oppose the petition of Dale F. Meyer (plaintiff below, hereinafter "Petitioner") for a writ of certiorari.

STATEMENT OF CASE

This case arises from the trial court's granting of all of Respondents' motions for summary judgment and motions to dismiss the complaint,[1] affirmed by the United States

[1]Order Granting Defendants' Motions to Dismiss and for Summary Judgment, filed March 20, 1979, Appendix "A" to Petition for a Writ of Certiorari [hereinafter "Petition for Writ"], received by Respondents January 17, 1983.

Court of Appeals for the Ninth Circuit.[2] While these rulings were predicated on a finding that "there is no genuine issue as to any material fact . . ."[3], the case was not decided on the purported "undisputed facts"[4] alleged by Petitioner.[5]

Petitioner is a very experienced, compulsive and impetuous commodities speculator. Prior to any trading in commodities through Respondents, Petitioner had maintained commodities trading accounts with at least six different brokerage firms (R. 46, p 2; R. 59)[6] and had subscribed to at least a dozen different commodity research and advisory services or newsletters, as well as a number of different commodities magazines and informational publications (R. 46, pp. 2-3). From early 1973 through mid-1977 Petitioner actively traded commodities through his own commodities trading accounts (incurring significant losses), participated in a commodity investment partnership managed by an independent advisor with whom Petitioner was familiar,[7] then joined another commodities trading partnership through a different brokerage firm and withdrew his profits in June, 1977 (R. 46, p. 4). In April, 1977 Petitioner telephoned Miller, then employed as an

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[2]*Meyer v. Thomson & McKinnon*, 686 F.2d 818 (9th Cir. 1982).

[3]Rule 56(c), Federal Rules of Civil Procedure.

[4]Petition for Writ at 2.

[5]This Statement of Case is submitted to more completely and accurately describe the facts, as permitted when it is "deemed necessary in correcting any inaccuracy or omission in the statement by the other side . . . ." Rule 34(2), U.S. Supreme Court Rules.

[6]"R" refers to the Clerk's Record in the Court of Appeals.

[7]After disagreeing with the first or second trade effected by the advisor, Petitioner immediately cancelled and withdrew his funds (R. 56, pp. 2-4).

account executive with Thomson McKinnon, "to find out what other advisors or managers were active that [Petitioner] might consider," and specifically inquired about Respondent UCA Systems, Inc. (hereinafter "UCA"); Petitioner called a representative of UCA on his own on several occasions (R. 46, p. 4; R. 56. pp. 2-3).

On August 12, 1977, Petitioner engaged the advisory services of UCA (R. 56, p. 3) by entering into a Commodity Advisor's Investment Advisory Agreement ("Advisory Agreement") for the purpose of trading in commodities future contracts (R. 8, Ex. A) and opened a commodities account with Thomson McKinnon from which Petitioner authorized the payment of management fees to UCA (R. 59, Petitioner's deposition [hereinafter "Depo."], Vol. II, pp. 73-74). He also executed a Limited Power of Attorney authorizing UCA to order trades in his commodity account (*Id.*, Vol. II, p. 74). Under the Advisory Agreement, Petitioner granted UCA exclusive authority to direct Thomson McKinnon to execute commodities transactions for Petitioner's account and risk (R. 8, Ex. A) and agreed that all commissions and expenses would be charged to his account (*Id.*, ¶ 5), but Petitioner retained the right at his sole discretion to withdraw funds from his commodities account at any time (*Id.*, ¶ 1); the Advisory Agreement was terminable at will by either Petitioner or UCA (*Id.*, ¶ 4). The Advisory Agreement provided that Petitioner would pay UCA a quarterly fee of six percent of the value of the assets being managed by UCA at the beginning of the quarter (*Id.*, ¶ 8); it contained no provision for increasing or decreasing the fee in the event of profits or losses in Petitioner's account, and the fee was not to be refunded or

prorated in the event of termination of the agreement before the end of the quarter (*Id.*, ¶ 4). Thomson McKinnon was to be paid commissions on a per trade basis, irrespective of profits or losses or the value of the account.

Less than three months later, in November, 1977, Petitioner terminated his Advisory Agreement with UCA because he had not realized a net profit in his account every month (R. 59, Depo. Vol. II, pp. 102-103). After terminating UCA's advisory services, Petitioner advised Thomson McKinnon that he wished to continue trading commodities through Thomson McKinnon on his own (without an independent advisor), but after investigation Thomson McKinnon advised Petitioner that it would not permit him to continue speculating in commodities through Thomson McKinnon (R. 46, p 5; R. 47, p 2; R. 56, p. 4). Thereafter, Petitioner reopened a commodities account at E.F. Hutton & Company, where he traded in commodities futures contracts for approximately three months (R. 59, Depo. Vol. II, p. 58). Then, one month after commencing this litigation, Petitioner opened a commodity account with Clayton Brokerage Company (R. 59, Depo. Vol. II, pp. 4-5). And on December 4, 1978, barely a few days prior to the first hearing on Respondents' motions to dismiss, Petitioner opened yet another commodity trading account—with the Denver office of Thomson McKinnon! (R. 58)[a]

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[a]This Statement of Case more accurately describes Petitioner's continuous speculation in commodities, during which he repeatedly changed brokerage firms, his manner of speculating, and his own inquiries (rather than being "persuaded" [Petition for Writ, p. 2] by Respondents) as to investment advisors, and directly dispels Petitioner's characterization that Respondents "sold" investments in discretionary accounts (*Id.*).

CERTIORARI SHOULD BE DENIED

1. Summary of Argument

The unique and narrow facts of this case do not warrant the exercise of this Court's extraordinary and discretionary jurisdiction. This is not a case of far-reaching significance but, rather, is confined to the claims of one compulsive and impetuous commodities speculator in search of a broker or advisor through whom to further his speculative desires. In no sense does this case involve an "investment" in the classic sense, or a "purchase" of stock, partnership interests, or traditional securities. Petitioner's suit, purposely omitting claims under the Commodity Exchange Act, has been correctly and fairly reviewed and rejected by an able district court judge and a thorough panel of judges from the Ninth Circuit Court of Appeals; any further review is unwarranted.

There is no need for this Court, in the context of the facts of this case, to consider additional regulation of discretionary commodities accounts. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, ... U.S. ....., 102 S.Ct. 1825 (1982), this Court held that there was an implied private right of action under the Commodity Exchange Act for fraud in favor of a commodity speculator against his broker.[9] Further, and significantly, the regulatory controls of the amended Commodity Exchange Act[10] and the rules and regulations promulgated pursuant to the authority granted to the Commodity Futures Trading Commission

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[9]102 S.Ct. at 1834. In affirming dismissal of the federal securities law claims, the Court did not disturb the Sixth Circuit's holding that a discretionary commodities account was not a security. *Id.* at 1834 n. 40.

[10]7 U.S.C. §§ 1-24 (1976 & Supp. III 1979).

("CFTC") provide a comprehensive system of protection to commodities traders; the CFTC has been granted exclusive jurisdiction in the field of commodities regulation, including discretionary commodities accounts. The existence of a comprehensive scheme of protective legislation militates against the implication of rights under the securities laws.[11] Finally, this case involves a narrow and unique, if perhaps academically interesting area, upon which valuable court time should not be spent.

2. The decision below was correct, fair and consistent

The Ninth Circuit, in applying the three-prong test of *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), i.e., that to find an investment contract there must be (1) an investment of money, (2) in a common enterprise, (3) with profits to come solely from the efforts of others, 328 U.S. at 301, and relying on *Brodt v. Bache & Co.*, 595 F.2d 459 (9th Cir. 1978) and *Mordaunt v. Incomco*, 686 F.2d 815 (9th Cir. 1982), determined that in this case there was no common enterprise, hence no investment contract or "security", and, judging the arrangement "in light of economic realities", affirmed. 686 F.2d at 819.

The focus of the federal securities laws is, and should be, "on the capital market of the enterprise system: the sale of securities to raise capital for profit making purposes . . . ." *United Housing Foundation, Inc. v. Forman,*

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[11] *See International Brotherhood of Teamsters, etc. v. Daniel*, 439 U.S. 551 (1979) (employee's interest in a pension plan not a security, in view of the comprehensive legislation of ERISA); *Marine Bank v. Weaver*, ... U.S. ..., 102 S.Ct. 1220, (1982) (certificate of deposit not a security, since issuing bank was subject to comprehensive regulations covering the banking industry).

421 U.S. 837, 849 (1975). In *Forman*, the Court, applying the *Howey* test, held that shares in a housing cooperative did not constitute securities and commented that the shares lacked the characteristics "that in our commercial world fall within the ordinary concept of a security." 421 U.S. at 851. Applying a similar rationale to this case, Petitioner's speculation in commodities and utilization of various brokerage firms and investment advisors to help effect his speculation, can hardly be characterized as traditional investments or purchases of securities.

In *Howey*, the Respondents sold investors small tracts of land in a large citrus grove development and offered service contracts whereby respondents would cultivate, harvest and market the citrus and remit proportionate shares of the net proceeds to the investors. The Court stated:

> "[These are] something more than fee simple interest in land. . . . They are offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by respondents. . . .
>
> Thus all the elements of a profit-seeking business venture are present here. The investors provide capital and share in the earnings and profits . . . ."

328 U.S. at 299-300.

As distinguished from the facts in *Howey*, here, Petitioner's trading in commodities futures contracts depended on no larger enterprise; none of the Respondents joined Petitioner's speculation in commodities futures contracts, nor did they seek the use of Petitioner's money to finance any enterprise in which they were engaged with Petitioner.

There was no "financial" commonality between Petitioner and Respondents; Respondents' only "investments" were their time and skills. Petitioner did not contribute capital to share in the profits of Thomson McKinnon's brokerage business or UCA's advisory business. He did not buy shares of either of the Respondents, but, rather, he was speculating in commodities.

Petitioner alleges that a conflict exists between the decision below and *SEC v. Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974). It should be noted that *Continental Commodities* was decided before the extensive 1974 amendments to the Commodity Exchange Act[12] which transferred authority over commodity futures regulation from the Department of Agriculture to the CFTC. 7 U.S.C. § 4a(a)(1). Also, the analysis in *Continental Commodities* has been discredited, and in large part has not been followed, in significant subsequent cases. For example, in *Curran v. Merrill Lynch*, 622 F.2d 216 (6th Cir. 1980), *aff'd*, 102 S.Ct. 1825 (1982), the Sixth Circuit rejected *Continental Commodities* and followed *Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir. 1972), *cert. denied*, 409 U.S. 887 (1972), and quoted *Brodt v. Bache & Co.*, *supra*, 595 F.2d 459 (9th Cir. 1978), with approval. 622 F.2d at 222, 223 n. 7. In so doing, the Sixth Circuit held that a discretionary commodity account was not a security subject to the federal securities laws. *Id.* at 224. This holding was expressly noted, and was not disturbed, by this Court in its landmark decision holding that a private right of action is available to private parties under the Commodity

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[12]Pub.L. No. 93-463, 88 Stat. 1389 (1974) (effective April 21, 1975).

Exchange Act. *Merrill Lynch v. Curran, supra*, 102 S.Ct. at 1834 n. 40.

Based on the above, Respondents respectfully submit that there is no significant conflict warranting the grant of certiorari by this Court. However, alternatively, should this court determine that review is appropriate in light of the alleged conflict with *Continental Commodities*, we respectfully urge that the protection of the securities laws should not be extended to this discretionary commodities account, since there already exists a comprehensive scheme of legislation covering commodities and discretionary commodities accounts,[13] and since exclusive jurisdiction over discretionary commodity accounts has been vested by Congress in the CFTC.[14]

3. There is no need for this court to grant certiorari and determine that a security is involved as protective legislation already exists

The Commodity Exchange Act, as amended by the Commodities Futures Trading Commission Act of 1974, provides that:

> The [Commodity Futures Trading] Commission shall have exclusive jurisdiction with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery traded or executed on a contract market. . . ."

7 U.S.C. § 2.

That Congress intended to invest the CFTC with exclusive jurisdiction over commodities trading accounts by

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[13] *See supra* footnote 10, and discussion *infra* pp. 8-10.

[14] 7 U.S.C. § 2, 4(a). *See* Note, *Federal Regulation of Discretionary Commodity Accounts*, 32 Hastings L.J. 871, 891 (1981) [hereinafter cited as *Note*].

this amendment is reflected in the Conference Report as follows:

> The *Senate* amendment retains the provisions of the *House* bill but adds three clarifying amendments. The clarifying amendments make clear that (a) the Commission's jurisdiction over futures contract markets or other exchanges is exclusive *and includes the regulation of commodity accounts, commodity trading agreements, and commodity options.*

H. R. Rep. No. 1383, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5843, 5897 (emphasis added).

This Court has recognized the sweeping changes implemented by the 1974 amendments to the Commodity Exchange Act, and that those new procedures constitute a comprehensive legislative scheme for investor protection etc. *Merrill Lynch v. Curran,* ..... U.S. ....., 102 S.Ct. 1825 (1982). We urge that "[t]he scope of the regulation affording protection to the investor in a discretionary commodity account under the Commodity Exchange Act obviates any reason to require these accounts to be registered under the Securities Act of 1933."[15]

This court has recently refused to expand the protection of the federal securities laws to an employee's interest in a pension fund in *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551 (1979) and to a certificate of deposit issued by a bank *Marine Bank v. Weaver,* ..... U.S. ....., 102 S.Ct. 1220 (1982). In both instances, the Court refused to expand the definition of "security" to encompass the interests there involved, on the grounds, at least

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[15]*See Note, supra* note 14, at 884.

in part, that comprehensive legislation existed elsewhere providing the requisite regulation and protection.

In *Daniel*, the Court stated:

> If any further evidence were needed to demonstrate that pension plans of the type involved are not subject to the Securities Acts, the enactment of ERISA in 1974 would put the matter to rest. Unlike the Securities Act, ERISA deals expressly and in detail with pension plans. . . . in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Act. . . .
>
> The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pension plans. Congress believed that it was filling a regulatory void when it enacted ERISA. . . . Not only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose. . . . Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more detailed form through ERISA.

439 U.S. at 569-70.

The comprehensive legislation regulating commodities trading and the commodity futures markets under the amended Commodity Exchange Act, similarly, "severely undercuts all arguments for extending the Securities Acts" to discretionary commodity accounts.

Likewise, in *Marine Bank*, this Court held that a certificate of deposit issued by a federally regulated bank was not a security, since the issuing bank "is subject to the

comprehensive set of regulations governing the banking industry." 102 S.Ct. at 1224.[16]

4. This case is unique, confined to its facts, and does not warrant the extraordinary invocation of this Court's discretionary review

While Petitioner purports to state a far-reaching issue,[17] it is clear from our Statement of Case that there was no "investment" here. Instead, Petitioner continued his own commodities speculation, using the "proprietary computer selection formula" unique to UCA and to this case.[18] In fact, it was from the *performance* resulting from the use of this system that Petitioner decided to terminate using UCA's advisory services.

The need to "clarify" the definition of security in this context may be an interesting academic exercise. However, this Court has refused to hear petitions where the issue in question is merely one of academic interest. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

As indicated above, a legally correct and fair decision was rendered below, on the limited dispute between the parties involving the specific Advisory Agreement involved in this case, and we respectfully urge that no amount of

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[16]In *Marine Bank* the court referred directly to its prior decision in *Daniel* and quoted the language quoted above. 102 S.Ct. 1224 n.7.

[17]"Whether investment in a managed commodity futures trading program based on a proprietary computer selection formula and marketed to the general public through a brokerage firm may involve the sale of an investment contract, and therefore of a security. . . ." Petition for Writ, p.i.

[18]"The Statistical Qualifier System is a unique approach. . . . [A] statistical discriminator is used. . . ." Petition for Writ, p. 3.

strained argument should magnify this case into one warranting consideration by this Court.

CONCLUSION

Respondents Thomson McKinnon and Miller respectfully urge that the petition for certiorari be denied.

Respectfully submitted,

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